

THE

CRIMINAL CODE OF THE JEWS

ACCORDING TO THE TALMUD

MASSECHETH SYNHEDRIN

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BY

PHILIP BERGER BENNY

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P R E F A C E.

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CONTENTS.

CHAPTER I.

	PAGE
INTRODUCTORY	I

CHAPTER II.

THE DEVELOPMENT OF THE MOSAIC CODE—OBSO- LETE LAWS—THE LEX TALIONIS—PRESCRIP- TIONS OF THE TALMUD	16
---	----

CHAPTER III.

THE CONSTITUTION OF THE COURTS—THE QUALI- FICATION OF JUDGES—PERSONS DISQUALIFIED	28
--	----

CHAPTER IV.

THE CONSTITUTION OF THE COURTS—DIVISION OF AUTHORITY—PROCEDURE	42
---	----

CHAPTER V.

THE RULES OF EVIDENCE	56
---------------------------------	----

CHAPTER VI.

FORM OF TRIAL IN CAPITAL CASES

PAGE

70

CHAPTER VII.

THE VARIOUS METHODS OF EXECUTION

84

CHAPTER VIII.

MURDER—ADULTERY—IDOLATRY

96

CHAPTER IX.

CITIES OF REFUGE—THE PUNISHMENT FOR PER-
JURY—FLOGGING

III

CHAPTER X.

MISCELLANEOUS LAWS—CONCLUSION

125

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CRIMINAL CODE OF THE JEWS.

CHAPTER I.

INTRODUCTORY.

HE who would understand a people must know its laws, especially its penal laws : not the mere dicta of its statutes, but their practical application ; and its scheme of judicial administration. The legal code of a community is—to coin a pseudo-scientific term—but a system of applied morals. In the criminal legislation of a country is embodied the public standard of right and wrong. The organisation of its tribunals, the simplicity of its procedure, the severity of its penalties, the nature of its punishments, are so many living illustrations

of the wisdom and forethought and justice and humanity of those who frame, interpret, and abide by these laws. Nowhere are national peculiarities more characteristically prominent than in the juridical scheme and penal practice of a people. Every detail is instructive. What, for instance, can be more suggestive of the temper of the ancient Egyptian, with his high notions of rectitude and his stern sense of justice, than the prohibition of pleading on behalf of either plaintiff or defendant? Sombre, impassive, and undemonstrative sat the thirty judges and their self-elected president in the hall of assembly. With reverential awe for the wise men, the suitors entered, each bringing with him a written statement of the cause to be adjudicated upon. The depositions were handed to the chief of the tribunal, who received them without question or comment. The parties as silently withdrew: only when the decision of the court had been arrived at were the plaintiff and defendant re-admitted,

in order that the judgment might be communicated to them. The picture of inflexible impartiality here presented to us is complete.

Again, can anything be more characteristic of Assyrian life than the inequality between man and woman in the eyes of the law which we find indicated in some of the few fragments hitherto discovered of the penal code of Ashur? 'If a husband,' runs a cuneiform text, 'say unto his wife "Thou art not my wife," he shall pay half a minna of silver.' But 'if a woman repudiate her husband, and say unto him, "Thou art not my husband" (*ina naru inadussu*), he shall drown her in the river.' In the criminal system of the Athenians, too, it is not a little indicative of the refined, hypersensitive, and artificially cultured Greek to find him attempting to emulate the 'gods' by extending to the children of an offender the punishment inflicted on their parent. Even when a crime had already been expiated by death, the descend-

ants of the condemned suffered the penalty of legal disqualification. Students of antiquity have been by no means indifferent to the lesson thus conveyed. The legal codes of most ancient peoples have been diligently examined. The laws of the Brahmans and of the Parsis, of the Greeks and of the Romans, of the Chinese and of the Mussulmans, have found zealous exponents. The judicial system of the Hebrews alone has been neglected. Notwithstanding its value as a record of Jewish thought and feeling and custom, it is almost unknown to English scholars and jurists.

It is probably no exaggeration to assert that not a dozen of the foremost Biblical critics in England know anything of the legal code of the Jews. The most profound ignorance prevails regarding the practical mode of administering law and justice as it obtained among the Hebrews during the prophetic period and at the time of the destruction of the second Temple of Jerusalem.

The notions of Jewish law and jurisprudence generally current are extremely vague and undefined. The popular conceptions upon the subject are gathered from the injunctions and ordinances of the Mosaic Pentateuch. As a matter of fact, the laws of Moses are about as well calculated to give one an insight into the Hebrew legal scheme as a perusal of our statute-book—a collection of our Acts of Parliament, our written law—alone, without the aid of common law and precedent, would give of the English system of juridical procedure. He who would understand the penal code of the Hebrews—the practical code, that is, of the people, as it was in operation during the later period of Jewish nationality—must not depend upon the Pentateuch. He must turn to the Talmud—that much maligned and even more misunderstood compilation of the rabbins; that digest of what Carlyle would term *allerlei-wissenschaften*; which is at once the compendium of their literature,

the storehouse of their tradition, the exponent of their faith, the record of their acquirements, the handbook of their ceremonials, and the summary of their legal code, civil and penal. Herein he shall find a system of jurisprudence ingenious and elaborate; a scheme of organisation at once simple and effective; and a criminal law the most interesting and probably the most humane that antiquity has transmitted to us.

The sensation produced some few years ago by the appearance of Dr. Deutsch's brilliant article on the Talmud is scarcely yet forgotten. Had this accomplished scholar been longer spared, literature would doubtless have been enriched with many a monograph upon the thousand and one subjects treated of in this composition of the rabbins. Fate has decided otherwise. But the seed he cast abroad into the world has not all fallen into stony or sterile soil. He succeeded in arousing a general and wide-spread interest in the Talmud and its contents; an interest

which the modern spirit of inquiry has intensified. We purpose, therefore, to devote to the criminal law of the Talmud as laid down in *Massecheth Synhedrin*—not wholly, but principally there—a few brief chapters explaining the organisation of tribunals among the Jews, the constitution and jurisdiction of their *Synhedrin*, their system of procedure, their mode of examining witnesses, their classification of crimes, the punishments they inflicted, and their methods of executing those capitally condemned. As we before observed, the subject is one entirely unexplored; and an exposition, however brief and imperfect, cannot but throw additional light upon the character, intellect, and peculiarities of a truly wonderful people.

Two noteworthy—we cannot say successful—attempts have of late been made to present to modern times a fair and impartial view of the criminal legislation of the Hebrews. One of these is the monograph of M. Thonissen, in his ‘*Études sur l’Histoire*

du Droit Criminel des Peuples Anciens.' The other is the 'Législation Criminelle du Talmud' of Dr. Rabbinowicz. Both must be regarded as failures—the former conspicuously so. M. Thonissen, who is one of the ablest Catholic professors in Belgium, has failed from want of special knowledge; Dr. Rabbinowicz has failed in spite of profound Talmudic knowledge and general erudition. A few observations in explanation of this will throw some light upon the peculiar nature of the treatise which forms the basis of our knowledge of the Jewish penal code. M. Thonissen has founded his study of the subject upon the text of the Pentateuch, disregarding altogether the commentaries of the rabbins and their expositions. Now we have no wish whatever to enter into any argument as to the value of Hebrew tradition or the Divine origin of the Oral Law. This, however, we assert: that the enactments, civil and criminal, of the Five Books of Moses, as they stand in the Bible are unintelligible

and incomprehensible unless accompanied by the explanation furnished by the Mischna and Ghemara, which together constitute the Talmud. In the first place, Moses indicated only general principles for the guidance of the Hebrew judges. A system of legal procedure is altogether wanting. ‘The wisdom of a lawgiver,’ says Bacon, ‘consists not only in a platform of justice, but in the application thereof.’ Moses furnished in the written law such a platform of justice; but the practical application thereof can only be gathered from the oral law, from the traditions and precedents of the Mischna. We will quote one contingency only—one among many others that arise in practice—to show the occasional inadequacy of the provisions of the Pentateuch taken alone. According to the Mosaic law a perjurer when convicted was to suffer the same punishment as the person against whom he testified would have been condemned to had the false accusation been established. In most cases the rule would suffice; in a great

number it would be impracticable. For instance, a *kohen*—a priest, that is—was forbidden to marry a woman who was divorced, or a widow who had performed the ceremony of loosening the shoe of her brother-in-law. Should he in defiance of this prohibition marry such a female his sons were debarred from the priesthood. Assuming now that an Israelite charged a *kohen* with being the issue of such a union—a charge which, if proved, would remove him from his office—and this witness was subsequently convicted of perjury: how could the slanderer who had violated his oath be degraded from what he was not permitted to assume—the functions of the priesthood? No penalty in such a case is provided by the Mosaic code. Yet it could scarcely have been the intention of the legislator to punish the lying witness in one case and permit him to get off scot free in another. The traditional procedure clears up the difficulty. Similar difficulties continually arise in the practical application of

most of the written enactments. In all these instances we are driven to the Oral Law for a satisfactory explanation. The Hebrew law-giver foresaw probably the awkward contingencies which would inevitably occur consequent upon a hard and fast adherence to ordinances formulated in the Pentateuch, and suited only to the circumstances and conditions of the people under his personal guidance and supervision in the Wilderness. Hence his injunction that the Jews should, immediately upon their settlement in Palestine appoint them 'judges and officers,' *i.e.* form regular courts for the administration of justice. This of course necessitated the inauguration of a recognised mode of procedure formulated in consonance with the traditions of the people, and varied as the exigencies of the nation required and experience rendered advisable. The nature of the arrangements made in compliance with the Mosaic injunction can be gathered only from the Talmud. M. Thonissen's essay upon the Jewish code re-

sembles most nearly that which a foreigner would write upon the English criminal laws after a perusal of our statute-book—our Acts of Parliament—disregarding such authorities as Blackstone and Coke and Bracton, and their common-law system, and ignorant altogether of the practice of the courts and the precedents they have established. What such an exposition would be worth may easily be imagined. That M. Thonissen should under these circumstances have failed is scarcely to be wondered at.

M. Rabbinowicz's failure is now to be accounted for. He has given to the world a disquisition upon the penal code of the Hebrews in the shape of a critical translation of the treatise *Synhedrin*, and of such portions of *Makkoth* as refer to the punishment of criminals. He is himself a profound Talmudist; but he does not make allowance for those who have not the advantage of being intimately acquainted with the rabbinical authorities. The Talmud, be it ob-

served, is essentially argumentative ; this fact should constantly be borne in mind. The Mischna no sooner lays down an axiom than a Beraïtha (precedent or tradition whose origin is coeval with those contained in the Mischna, but which the editor of the last-named collection decided to omit) is brought forward to contradict it. Hereupon the commentators set to work in order to harmonise the apparent inconsistency or disaccord. An opponent will then urge against the agreement thus established the opinion of one of the Thanaïm—rabbins, or heads of colleges, who were anterior to, or contemporaries of, the editor of the Mischna. The Amoraïm—doctors whose disquisitions constitute the Ghemara—thereupon take up the discussion pro and con. Frequently the arguments terminate, and apparently no conclusion is arrived at. It is this that renders the study of the Talmud so extremely difficult. It seems impossible to understand which of the views enunciated by the respective authori-

ties we are to accept as decisive. Only those accustomed to the mode of reasoning adopted by the rabbins, and acquainted with the relative value to be attached to the dicta of the several doctors as explained in the various commentaries, can deduce the laws with any approach to accuracy.

Many points, however, are wholly undetermined, and probably always will remain unsolved. In giving a translation of the treatise *Synhedrin* M. Rabbinowicz has therefore placed in the hands of the reader the material whence he may derive a knowledge of the criminal law. Some explanations of seemingly difficult points are given; but the student must pick his own way without the training or help which would enable him with profit to do so. Of the multifarious opinions expressed he nine times out of ten knows not which to choose. Hence, despite the undoubted ability of the author, and the acknowledged merit of the work itself, Dr. Rabbinowicz has not succeeded in giving a

digest of the criminal law of the Talmud. His introduction is by far the best part of the work; but the views therein expressed do not always merit complete and entire acceptance. We shall, as we proceed, indicate here and there the doubtful points, as they appear to us, of M. Rabbinowicz's summary.

Having thus briefly, by way of introduction, explained the source whence our knowledge of the Hebrew penal code is to be derived, and pointed out what we regard as the defects of those who have of late attempted an exposition of the enactments of which it is composed, we may proceed to the consideration of this interesting judicial system.

CHAPTER II.

THE DEVELOPMENT OF THE MOSAIC CODE—OBSOLETE LAWS—THE LEX TALIONIS—PRESCRIPTIONS OF THE TALMUD.

THE penal code of the Hebrews in the Talmudic period had developed itself gradually in a manner somewhat similar to the Athenian criminal law in the days of Demosthenes. In each of these legal systems we can discover three elements superimposed. In the case of the Greeks there had been originally the laws of Draco formulated about six centuries before the Christian era. They consisted of a series of religious ordinances and traditionary practices. These were subsequently modified by Solon; still further amended in all probability by Clisthenes after the triumph of the Democracy. This period saw the institution of popular tribu-

nals at Athens, and the assimilation of the mode of procedure in civil and criminal cases. Towards the end of the fifth century B.C. the progress of the state and the multiplying of parties led to a further development of the legal system. One of the results of this, by the way, was the appointment of a public prosecutor. Three analogous stages of growth—though not quite so clearly marked in the second epoch—are discernible in the development of the Hebrew laws, as we find them formulated in the Talmud. There are, in the first place, the Mosaic injunctions, religious, social, and political, which constitute the foundation of the scheme. There are then the practical details as to the organisation of the tribunals. These must have had their origin in the early days of the Jewish Commonwealth; most probably during the lifetime of Joshua. One of the principal commands laid upon the Israelites in the Wilderness was, as we have already mentioned, to appoint judges, *i.e.* establish courts

for the administration of justice, as soon as they were settled in Palestine. (Deut. xvi. 18.) Lastly, we find in the Talmud, laws attributable evidently to the period which intervened between the destruction of the first and second Temples. About this time a number of the Mosaic ordinances had become utter anachronisms. Some were perfectly impracticable; one or two were no longer even understood. The exigencies of the age and the circumstances of the people necessitated the adoption of several enactments unknown to the Pentateuch. Throughout, however, the whole of the penal code of the Talmud—as in its various stages of development—the Divine origin of the Hebrew legal system is never for a moment lost sight of. The abolition of a Mosaic enactment is with the Rabbins simply a statement that it has fallen into desuetude. In formulating a new law, rendered necessary by the altered condition of their existence, it is invariably founded upon some principle or

other contained in the Written Law, or deducible from the general dicta therein laid down by their inspired legislator. Like the Greeks—‘The Sons of Saturn,’ sings Hesiod, ‘gave to man justice, the most precious of good gifts’—the Jews, in the interpretation of their ancient laws, as in the application of new ordinances, were ever mindful of the Divine source whence their system of judicature originated.

The Mosaic prescriptions, which in the course of time had fallen into desuetude, and had in fact become altogether obsolete, include many of the most characteristic laws of the Pentateuch. Among such ordinances was the injunction which determined the punishment of a stubborn and rebellious son. Of this commandment the Ghemara—by the dicta of Rabbi Simon—observes: ‘The Biblical law concerning a stubborn and rebellious son never has been and never can be practically applied. If we nevertheless study it, it is simply as one does a literary ex-

ercise.' Similarly, the Mosaic enactment, in accordance with which a city given to idolatry was ordered to be destroyed, had become a pure anachronism in the latter days of the Jewish nationality. According to the Talmud, this law could not have been carried into effect at any period. And the penal code further took no longer any cognisance of a large class of offences known as acts of omission. An extremely important ordinance of the Pentateuch concerning the punishment of perjurers was imperfectly understood by the Rabbins. The apparently simple law which determined the penalty incurred by witnesses whose evidence was proved to be false was beset with difficulties, and found inapplicable to the times. The Ghemara declares through Rabba that the 'Mosaic injunction which condemns the witness who is perjured, by proving an alibi against him, is a *hidousch*—a law we are not able to explain or comprehend.'

Among the ordinances of Moses, of which

no trace is to be found in the Talmud, is the so-called *lex talionis*. More nonsense has probably been written respecting this law of retaliation (which crops up in every code of antiquity) than would fill the proverbial bushel a goodly number of times. It is generally quoted as satisfactorily demonstrating the harshness and severity of the punishments ordained in the Pentateuch.

More than one theological school consider the dicta 'eye for eye, tooth for tooth' as the very quintessence of Jewish legislation. The odium attached to the Mosaic code, on account of this law, furnishes another illustration of the vulgar adage about giving a dog an ill name. Curiously enough, there is a remarkable parallel to this misconception in the case of the Athenian jurist Draco. His code is fabled to have been written in blood; death was the least of the punishments he inflicted. His name has furnished an appellation for all that is harsh even to cruelty, unmerciful even to barbarity.

Yet what is the truth? His laws relating to homicide (graven on a pillar at Athens) continued in force as long as the city was independent. A murderer was permitted, under this code, to fly in order to escape the vengeance of the family of his victim. Sentence of exile could be pronounced by the judges in cases of manslaughter. Degradation from the rank of citizen was one of the penalties of his system. And more remarkable still, Pollux (ix. 61) distinctly says that the fine for slaying a man was ten oxen! So much for the reputed severity of the Draconic Laws. The ridiculous and wholly absurd nature of the prejudice anent that bugbear of the Five Books of Moses, the law of retaliation, is even more unfounded than in the case of Draco.

The *lex talionis* was simply a law by which a person deliberately and purposely and maliciously inflicting upon another certain specified injuries, was liable to have similar injuries inflicted upon his own person.

This penalty was directed against a mode of vengeance extremely prevalent in ancient days. Mutilation, dismemberment, and similar eccentricities of our progenitors, 'the children of the world,' were common methods of hurting one's supposed enemies, especially in eastern lands. There such practices are by no means forgotten even now. The object of the criminal was to palpably and visibly disfigure or emasculate his victim. In such cases what would have been the deterrent effect of a pecuniary indemnity, of incarceration, or even of corporal punishment? None whatever, where a man had determined upon injuring his opponent in a manner sufficiently conspicuous to disgrace or dishonour him. Nothing but the *lex talionis* was likely to prove of service in preventing the commission of such inhuman and dastardly outrages. That the law was not otherwise applied by any nation we have ample evidence to show. Among the Greeks, for instance, who included this enactment in their ancient code,

(‘Evil for evil,’ says *Æschylus*, ‘was the sentence of ancient days’) one of the principal functions of the second of the Athenian tribunals was to arrange between the murderer and the parents of his victim the payment of the blood-money authorised by their penal laws. To suppose that a man guilty of a capital offence should be condemned in a pecuniary penalty, while one accidentally injuring his neighbour was subject to the *lex talionis*, would be the height of absurdity. Among the Hebrews the necessity for preserving the law of retaliation as part of the legal code had disappeared long before the Talmudic period. In accordance with their traditions, all cases of assault or wounding were punishable by fines, the offender making full and ample indemnity to the person hurt.

With regard to the new laws formulated in the Talmud, and of which no trace whatever is to be discovered in the Pentateuch, there is one of the utmost significance; one that will admit of a very simple explanation,

though M. Rabbinowicz, in his introduction before alluded to, seems to misapprehend it somewhat. It is the law requiring evidence that a warning was given to the individual about to commit a crime, that the act he contemplated was an offence entailing such and such a punishment or penalty. The Bible knows nothing whatever of such a proviso. It required merely the testimony of competent witnesses as to the fact that a crime had actually been committed ; and that the said witnesses had detected the accused in *flagrante delicto*. Certain of the Rabbins, however, seem to assert that to ensure conviction in a capital trial, it must be proved that the culprit—prior of course to the perpetration of the offence—was cautioned that the crime he contemplated was murder ; that the perpetration entailed death ; and more, he must have been informed which of the four kinds of death he was liable to suffer if convicted !

This certainly is a very remarkable provision if intended to be construed as Dr.

Rabbinowicz points out. He regards this law of the Talmud as purposely enacted in order to abolish altogether the punishment of death. It would of course have this effect. For no individual would be likely to inform his friends or neighbours, or acquaintances, that he was about to commit a murder. The opportunity to give him this preliminary warning would never, in point of fact, occur. The same of adultery, or seduction with violence, crimes which were also punishable with death. By insisting upon this conditional circumstance as absolutely necessary to ensure a capital conviction, the criminal would, as intended, invariably escape the penalty of death. Against the views of Dr. Rabbino-wicz we would urge two very simple facts. In the first place the ordinances and precautions of the Talmud were already—and without the proviso referred to—more than sufficient to prevent the sentence of death from being pronounced except in extremely rare cases. And in the second place, the

opinions of many of the Thanaïm are, as we shall in the proper place fully explain, opposed to the assumption of Dr. Rabbinowicz. The true purpose and object of this curious institution of the Talmud will then appear.

CHAPTER III.

THE CONSTITUTION OF THE COURTS—THE QUALIFICATION OF JUDGES—PERSONS DISQUALIFIED.

FOR the administration of justice there existed among the Hebrews three kinds of tribunals: 1, Petty courts composed of three judges, and competent to adjudicate upon civil causes only; 2, The provincial Synhedrin, consisting of three-and-twenty members, and having criminal jurisdiction as well as the power of deciding in ordinary matters; and, 3, The Great Synhedrin of Jerusalem, which was the supreme authority of the nation. In contradistinction to the practice of every other ancient nation, the King, among the Jews, was not permitted to exercise judicial functions. Unlike the High Priest, he could neither judge nor could he be judged. Nor

had the Sovereign any voice, prerogative, or influence in the appointment of the judges; nor was it for him to interfere in any way with the organisation of the various tribunals. The people alone had the right to nominate the members of the Synhedrin. The scheme of legal administration was based on the representative system and what we should nowadays term universal suffrage. In the case of the petty courts for the trial of civil processes the mode of appointment was essentially primitive and simple. The plaintiff and defendant in a cause nominated each of them a competent person to act as judge. The two who were thus selected together named a third. Of course these tribunals were not permanent. They sat only when required.

In the case of the courts of criminal jurisdiction the mode of organisation and the manner in which they were constituted were as follows:—Every town inhabited by one hundred and twenty families could have

a Synhedrin of three-and-twenty members To each place thus qualified the Great Synhedrin of Jerusalem sent an order bidding the residents assemble and nominate from among themselves such as were 'learned and modest and popular.' Fit representatives and apt were accordingly elected. A return was thereupon made to the Great Synhedrin, and the supreme body immediately despatched an authorisation, in conformity with custom, which constituted the delegates named a corporate Synhedrin. As a rule these tribunals in the smaller towns sat only occasionally for judicial purposes. But in large and important centres there were, necessarily, permanent courts. In those cities where rabbinical colleges were established for the study of the law, such institutions, by a natural transition and development, came to be charged with the administration of justice. Such, for example, were the academies of Jabneh, under the famous Gamaliel; of Beni Berak, under Rabbi Akiba; of Lud, under Rabbi

Eleazar ; of Sikhni, under the direction of Hananya ben T'radyon.

In Jerusalem there were three Synhedrin : two ordinary, of twenty-three members each, and the Great Synhedrin of the nation, consisting of seventy-one of the most eminent judges of the country. The first sat in that part of the Temple called the Har-habaith ; the second, in the court known as the Azara ; and the supreme council in the Lishkat-hagazith. The first consisted of members selected from the various provincial Synhedrin ; the second was recruited from the first ; and the Great Synhedrin, in turn, filled up any vacancies in its numbers from those who composed the second. This completed the administrative system of the Hebrews for judicial purposes. The organisation was exceedingly simple, eminently representative, and it seems to have been thoroughly effective. Every suitor found at his own door a tribunal competent to hear and decide his plaint without delay or expense ; criminals

were spared suspense and ignominy by being able to secure an immediate trial ; and within easy reach of either complainant or defendant, prosecutor or prisoner, was a permanent Synhedrin to which appeals could be made from the sentence or decision of the local court.

Under this scheme every man—every Jew, that is—might aspire to the dignity of a judge. In order, however, to prevent any but competent and well-qualified persons from being appointed to the various tribunals ample precautions were taken. It was not necessary in the case of the provincial Synhedrin to guard against sheer inefficiency. No Israelite could be absolutely ignorant of the law. It must be remembered that education was well advanced among the Hebrews, especially after the first or Babylonian captivity. A system of compulsory instruction had been introduced by Joshua, the son of Gamala. There was a school-board for each district. Every child more than six years of age was obliged to attend the communal

schools, unless receiving private lessons at home from qualified tutors. Such importance does the Talmud attach to the training of the young that it enters into the minutest details upon the subject. From his earliest years the Jewish boy was a diligent student of the Bible. It was his primer and reading-book. Its laws and traditions were almost as familiar to him as his own existence ; they formed part and parcel of his every-day experience. In riper manhood he attended each evening after labour the expositions of the Scripture. On Sabbaths, on festivals, and on the mornings of Monday and Thursday, he was present as a religious duty at the public reading and interpretation of the law.

A Jew could not but be well acquainted with the leading principles of his legal code and their general application. He was, in fact, competent to decide—much as our justices of the peace are—any ordinary infractions of the law likely to occur in his own district. But to become member of a Synhedrin having

extensive criminal jurisdiction, to be qualified to act as judge in a trial involving the life or death of a fellow-creature, was another matter. Here legal acumen, proved ability, sound knowledge, and undoubted integrity were required. Such men, 'learned in the law' and versed in science, might subsequently be admitted into the Synhedrin of Jerusalem, the supreme council of the nation. The standard of qualification was therefore necessarily high in every particular. Accordingly, when a mandate from the capital authorising the formation of a criminal tribunal arrived in a town, the residents took every precaution to nominate such men whose antecedents and acquirements guaranteed their fitness for the posts they were to occupy. The election of representatives incompetent and inapt might have been followed by a refusal of the certificate of legality from the Great Synhedrin.

Few things are more remarkable in the Hebrew penal code than the clauses by which

certain persons were disqualified from acting as judges, under any circumstances whatever. All who made money by dice-playing, by any games of hazard, by betting on pigeon-matches, and similar objectionable practices, were not only incapable of becoming members of a tribunal, but were not permitted to give evidence in a trial. The Ghemara regards a man who gains money by the amusements named as actually dishonest. A Jew who was in the habit of lending money upon usury was in like manner disqualified. The disqualification extended not only to those who took interest of their brethren, but even to cases where the money had been borrowed by a heathen. Nor could a slave-dealer sit as judge. The Talmud stigmatises such a person as inhuman and unfeeling, and incapable therefore of deciding an issue involving the life or liberty or even property of another. Of course this ordinance applied to the traffic in human creatures who were not Jews; the kidnapping of an Israelite being punishable

with death. The following were also regarded as judicially incapacitated : those who dealt in the fruits of the seventh year, for they could not be deemed conscientious ; those who were in any way concerned in the cause to be adjudicated upon, for they were interested ; all relatives, no matter what the degree of consanguinity, of the person accused ; all who would inherit property from the criminal who was on trial, or would benefit by his condemnation or loss ; and persons who had been guilty of seduction or the lesser form of adultery which was punishable by fine or flogging.

One other disqualification, noteworthy in its way, also existed. A man who had not, or had never had, a fixed occupation, trade, or business, by which he earned a livelihood, was not allowed to act as judge. 'He who neglects to teach his son a trade,' say the rabbins, 'is as though he taught him to steal.' Such a lad had no resource in manhood but to beg or rob. A man without a calling or profession was moreover regarded as not cal-

culated to have consideration or sympathy for those exposed to the hard contingencies of life. In trials where capital punishment might be inflicted in case of conviction the following also were disqualified :—An aged man, because his years and infirmities were likely to render him harsh, perhaps obstinate and unyielding; a judge who had never had any children of his own, for he could not know the paternal feeling which should warm him on behalf of the son of Israel who was in peril of his life; and a bastard; not an illegitimate son—for such a relationship could not exist among the Jews—but one born of a forbidden or criminal connection. Nor under any circumstances was a man known to be at enmity with the accused person permitted to occupy a position among his judges. Such enmity was, by the way, presumed to exist when the judge or witness had not spoken to the person charged with any offence for a period of more than three days.

According to *Massecheth Synhedrin*,

mental qualities and intellectual acquirements of no ordinary character were necessary to constitute a competent judge. He was, in the first instance, to be modest, of good repute among his neighbours, and generally liked. He must have been intimately acquainted with the written enactments of the legal code, its traditional practices, the precedents of the colleges, and the accepted decisions of former judges. He must have studied not alone the laws applicable to the times in which he lived, but those which from altered circumstances had fallen into desuetude. He was required to be a proficient in various branches of scientific knowledge, especially in medicine and astronomy. That the rabbins were well grounded in physiology, pathology, and such modes of chemical and organic analysis as were then understood can be shown by many instances. Thus we find Rabbi Ismael and his pupils engaged in dissection in order to study the anatomy of the human frame (Bekoroth) ; Baba bar Boutah

(Ghittin) is recorded to have demonstrated, in a case before him, that a witness had attempted to impose upon the court, by bringing the albumen of an egg, and falsely representing it to be spermatic fluid. And the Academy of Hillel is said to have contained among its disciples eighty who were acquainted with every branch of science known in those days. A knowledge of languages, too, was indispensable for those who aspired to the membership of a Synhedrin. The services of an interpreter were never permitted. The judges were therefore bound to be acquainted with the tongues of the neighbouring nations. In the case of a foreigner being called as witness before a tribunal it was absolutely necessary that two members should understand the language in which the stranger's evidence was given ; that two others should be able to speak to him ; while another was required to be both able to understand and to converse with the witness. A majority of three judges could

always thus be obtained on any doubtful point in the interpretation of the testimony submitted to the court. At Bither there were three rabbins acquainted with every language then known ; while at Jabneh there were said to be four similarly endowed with the gift of 'all the tongues.'

As regards the general ability of the judges, Rabbi Jehuda asserts that 'they should be such apt and skilful logicians that they could demonstrate from the written text of the Pentateuch itself that all the reptiles therein declared to be impure were pure' ! Indeed, to those acquainted with the Talmud, nothing is more startling than the resources of argument displayed by the rabbins. That it is in many cases purely sophistic does not detract from their high character any more than the forensic casuistry of a modern counsel detracts from the morality of the man. And their intellectual acumen, their logical powers, were employed on behalf of the criminal,

whose advocates the judges themselves were. Of this we shall see more later on.

When, therefore, the Talmud insisted upon a high standard of qualification for the members of the Synhedrin, it was animated not alone by a due and proper regard for the dignity of the judicial office, but by a merciful consideration for the offender, and a desire to secure for one whom they looked upon as an unfortunate brother, the advantage of skilful, acute, and learned counsel.

CHAPTER IV.

THE CONSTITUTION OF THE COURTS—DIVISION OF AUTHORITY—PROCEDURE.

THE jurisdiction exercised by each of the three kinds of tribunals engaged in the administration of the penal laws was clearly defined. A conflict of authority was impossible. Each court took cognisance of certain specified offences, and of these only; each court possessed the power of inflicting certain punishments or of imposing certain penalties, and none other. Even the amount of fine or indemnity payable in the majority of cases was already determined by written enactment. And where this was not so fixed or approximately indicated, the constitution of the tribunals permitted of arbitration, and an estimate of the penalty incurred by an offender could readily be arrived at.

Before describing the authority and privileges attached to the respective tribunals it is necessary to note that, owing to the prescriptions of the Mosaic code, the classification of crimes among the Hebrews was somewhat different to that generally prevailing in modern times. Many offences which in our days are considered to infringe only the moral code were regarded among most ancient peoples in a very different light. Such, for example, are adultery and idolatry. These among the Jews entailed death. Again, many crimes now generally punishable with imprisonment were, according to the Hebrew laws, only punishable by fine or pecuniary indemnity to the prosecuting party. Among these are theft of all kinds, assaults, injuries to the person, and damage to property.

Another large class of offences was unknown to the Jews. There were in Palestine no game laws; there could therefore be no poaching. The relief of the poor was

compulsory ; there was no pilfering. It was permitted to enter a neighbour's garden or orchard or vineyard and eat one's fill ; petty larceny and trespassing were therefore impossibilities almost in rural districts. Hence the penal code of the Hebrews dealt practically with a comparatively small number of offences briefly specified, clearly defined, and entailing in each case a fixed punishment or penalty, which could not be varied. The jurisdiction of the respective courts admitted, therefore, of easy definition. The ordinary tribunals, composed of three judges, adjudicated summarily upon all cases of assault, all cases of theft, all cases of robbery with violence, and all cases of injury to person or damage to property. In fact, all crimes entailing pecuniary penalties upon those convicted of their commission were tried before the courts of three members. In every instance it was deemed an advantage, in later Talmudic times, to have at least one *mumcha* (authorised jurist) among the three. The

presence of such a rabbin added, of course, to the local repute of the court in which he sat. It may be worth while pointing out here that, apart from the legal jurisdiction pertaining to them, these bodies performed when required certain other functions, some of them semi-religious. They could, for instance, estimate the worth of the fourth year's produce, which had to be paid to the priests ; they acted as arbitrators ; they formed a court of equity ; they could pronounce judgment in ordinary business litigation ; they could absolve an Israelite from a rash vow ; and (a rather difficult task, if the Jews of old resembled in some respects their modern representatives) they could declare the personal worth of a Hebrew when he had sworn to give an equivalent sum to the Temple.

A Synhedrin of three-and-twenty members was competent to judge all criminal cases, involving (1) capital punishment ; (2) internment in a city of refuge ; (3) imprisonment or seclusion for life ; and (4) corporal

punishment. To these four classes of offences belong murder, adultery, blasphemy, idolatry, incest, manslaughter, and seduction with violence. An animal (an ox that had gored a man so that he died) was also condemned to be slaughtered by a tribunal of three-and-twenty judges. The beast was in some sort put on trial ; because of the heavy pecuniary penalty imposed where the owner could be proved to have known the vicious propensities of the animal. The value of a life had to be estimated by the court in such cases. The Synhedrin (like the smaller courts of three) sat whenever occasion required, and always *en permanence* on Mondays and Thursdays. These days were selected for the regular administration of justice on account of their convenience to judges, suitors, and the public. On the mornings named the inhabitants of the outlying districts and suburbs came into the towns for the purpose of attending the reading of the law in public assembly. Every adult male,

unless incapacitated by sickness, was present on these occasions. Here, then, was an excellent opportunity for the settlement of disputes and the trial of offenders. But there were other reasons for the regular bi-weekly meeting of the Synhedrin. These courts of three-and-twenty members constituted the local governing body of their district or division. Their functions were important and multifarious. They estimated the amount of the taxes to be imposed ; they organised the distribution of communal charity ; they were charged with the management and administration of the public elementary schools ; they saw that weights and measures were carefully inspected from time to time, affixing their seals to all legal standards ; they constructed, examined, and repaired the defences of the walled towns ; they were the local highway board ; they were sanitary authorities ; they discharged the thousand and one duties of local government.

The mode of procedure in ordinary trials

was very simple. The prosecutor attended before the Synhedrin and lodged his complaint; the officer appointed by the court for that purpose sought the accused person and brought him before the tribunal. The witnesses were summoned and heard. Both parties then quitted the hall where the trial took place. The judges deliberated, and afterwards readmitted the prosecutor and the defendant. Judgment was then pronounced. No advocates were heard; the members of the tribunal deeming it meritorious to exercise the utmost ingenuity in order to discover mitigating facts or extenuating circumstances when the law was clearly against the accused. Right of appeal existed and had to be acted upon within thirty days of the original hearing. In such cases the cause was taken to a neighbouring Synhedrin, which, from its containing a greater number of more learned and practised jurists, was deemed of superior authority. In all instances, whether the trial was before a full court or an ordinary tribunal of

three, the reasons and arguments upon which the decision was founded had to be communicated to the suitors. But, on the other hand, the fact of there having been any dissentient judges among the members was always carefully concealed. As a natural consequence the sentence pronounced was regarded as the unanimous decision of the tribunals. Dissatisfaction was thus discouraged, and appeals were probably, as one of the rabbins states, of infrequent occurrence.

The Great Synhedrin of Jerusalem, consisting of seventy-one members, was, as the supreme council of the nation, the highest court of criminal jurisdiction. This important body, and this body only, was competent to judge (1) a High Priest against whom an accusation had been preferred ; (2) a false prophet ; (3) a city given to pagan practices ; and (4) an entire tribe. In the legal administration of the Hebrews the principal duties devolving upon the grand tribunal of the

capital were : to exercise a species of supervision over the provincial Synhedrin ; to grant the certificates authorising their constitution and confirming their legality ; to furnish precedents and traditions whenever required by the subordinate courts, and to give satisfactory interpretations of doubtful and difficult points. If a case, civil or criminal, was brought before an ordinary tribunal of three-and-twenty judges, and these found themselves without a registered decision which enabled them to pronounce an authoritative sentence, a statement of the facts was carefully prepared and submitted to a neighbouring Synhedrin supposed to be of greater repute. If these found a recorded precedent or accepted judgment in an analogous case, it was explained to the delegates of the other court. If, on the other hand, no such tradition was forthcoming, application was made to the first of the Synhedrin in Jerusalem, that sitting in the Har-habaith. Should these find themselves

unable to give the required assistance, an appeal was made to the second Synhedrin, located in the Azarah. If, again, this court was not in possession of a satisfactory tradition, the matter was brought before the Great Synhedrin. In all cases where no precedent existed this body decided in accordance with justice and equity. The case was laid before them, carefully discussed, and after due deliberation the assembly voted. The views of the majority were considered binding. Non-compliance with a judgment of the Great Synhedrin was punishable with death. An elder, or judge, who acted or taught in contravention of the decisions of this august council was by the Mosaic code to be condemned to die. The Talmud made a notable distinction in the application of this law. If the heterodox teaching of the recalcitrant individual was directed against an injunction of the Pentateuch he was not condemned ; if against the tradition, or precedent, or interpretation of the Synhedrin he could be capi-

tally convicted. This apparently places the dicta of the rabbins above the words of the sacred and inspired text. The explanation, however, is simple. Contrary to the received impression that the Talmudists adhered to the letter and neglected the spirit of the Law, the reverse was the case. They investigated the motive and endeavoured to ascertain the object of each enactment. Now, Moses wished only to prevent an elder from leading the people astray by teaching what was illegal. A lawyer who nowadays advised a client that forgery and embezzlement were under certain circumstances not criminal would scarcely succeed in deceiving the most addle-pated individual who came to him for counsel; but the same authority might do serious injury, even to educated men, by misrepresenting the decisions of the law-courts on matters of common interest or private concern. So the rabbins argued. An elder who taught in opposition to an explicit command of the Pentateuch could

do little or no harm, for everybody knew the injunctions of Moses ; but he who misinterpreted to his community the decisions of the Synhedrin might cause irreparable mischief to his brethren generally. Hence the practice of the Talmud. The Great Synhedrin at Jerusalem possessed likewise the power to condemn or exile in times of danger, or for the public good, any person who was considered dangerous to the community. No tribunal, it must also be noted, could try or punish a person for an offence perpetrated in its own presence. If a murder was committed in full view of a Synhedrin, the criminal had to be taken before another court of three-and-twenty judges in order to be examined, and if found guilty convicted.

It will be seen that a trial before a Synhedrin was virtually a trial by jury. The members of the court were moreover the prisoner's counsel as well as his judges. They sought to interpret the law in his favour; failing this, they endeavoured to

find extenuating circumstances. As jury-men they could make such recommendations of mercy as their own feelings dictated: as judges they could give practical effect to these recommendations. In fact, the trial was a trial by jury without the anomalies which in modern times distinguish the functions of this venerable and useful institution. Those who are judges of fact, and belong presumably to the same social class of the community as the prisoner before them, should also, in justice, be the best judges of the degree of culpability attached to the commission of any particular crime. With the minimum and maximum of punishment which the law permits placed before them, the jury who find the accused guilty should in equity determine the sentence to be pronounced. Modern codes relegate this power in criminal cases—not in civil causes—to the judge. The results are extremely curious; were it not for the gravity of the wrong inflicted, one might add diverting. In most

ancient penal systems the judge was regarded, and very properly, as competent to decide upon matters of fact as well as in questions of law. But the right to apportion punishment was not always conceded to him. In the best days of the Roman Republic the *Questio perpetua* presided over the trial of a criminal; but the jury—the citizen judges, numbering thirty-two, or forty, or ninety, or even a hundred—convicted the prisoner and pronounced the sentence of death. The presiding magistrates were in reality but legal assessors or advisers. In the Hebrew system such division of labour was rendered unnecessary. The members of a Synhedrin were in themselves the judges as well as the jury; and the characteristic religious bias of every Israelite, the desire to emulate the *middath rakhamin*—the heavenly attribute of mercy—was of obvious effect. It led them in every instance to place the most favourable construction possible upon the conduct of an erring brother.

CHAPTER V.

THE RULES OF EVIDENCE.

THE rules of evidence, as formulated in the Talmud, are of a remarkable character. They are in most respects unlike those of any ancient legal code ; and are diametrically opposed to our modern English practice in every important particular. The primary object of the Hebrew judicial system was to render the conviction of an innocent person impossible. All the ingenuity of the Jewish legists was directed to the attainment of this end. Everywhere the punishment of the guilty seems subordinated to this principal consideration. The credibility of witnesses must be established beyond doubt ; their impartiality must be placed above suspicion ; the likelihood of prejudice animating

any person testifying against a prisoner must be carefully sought out. The admissibility of evidence was determined by a series of stringent regulations disqualifying in each case a number of individuals from coming forward as witnesses. No man could incriminate himself; nor could a wife give evidence against a husband. (Among the Hebrews a betrothed girl was regarded by the law as a married woman.) On the other hand, a prisoner was not debarred from testifying in his own favour; any argument he wished to urge, irrespective of its legal worth, was heard by the judges. Relatives—including many allied by marriage, and nearly all those allied by blood—were incompetent to appear as witnesses. Grandchildren formed, however, an exception to this rule. Those standing *in loco parentis* to the accused at the time the alleged offence was committed or when the trial commenced; the *shushbin*—best man, groomsman—during the seven days of marriage; an enemy, *i.e.* one who

had not spoken to the prisoner for a period of three days, owing to dislike or hatred or on account of differences; a creditor; any person to whom the accused had lent money; all who publicly and derisively—*b'frase*—acted in contravention of the Mosaic laws regarding food, cleanliness, and decency; all such as had been convicted of attempting to wrong or defraud a neighbour (the Talmud regards such persons as worse than those who sin against Heaven only)—these, and all others who were disqualified from acting as judges in a cause, were declared incompetent to appear as witnesses. The rabbins carefully made allowance for human weakness and natural promptings. They did not expose relatives to the temptation of violating the sanctity of their oath; and they spared father, or son, or brother the pain of being compelled to speak the damning word which should consign, perhaps to death, one near and dear to them. Thus, the partiality of friends, the affection of

relatives, or the enmity of opponents, could in no wise affect the issues of a trial.

The mode of examining witnesses, as prescribed by the Hebrew code, is probably without a parallel. It consisted, in the absolutely essential portion, of a series of leading questions propounded by the judges. These questions were fixed by law, and no deviation was permissible. There were two sets of questions: the first, known as the *Hakirah*, investigation as to time and place; the second, termed *Bedikah*, investigation as to relevant circumstances and corroborative facts. The fundamental principle of the Jewish law of evidence was that the testimony against a prisoner should, if it be false, admit of being overthrown by proving an alibi against the witness, entailing upon the perjurer the penalty of death in all purely criminal cases. This condition was absolutely essential. It is clear that the only statements capable of being contradicted in this manner must confine themselves to de-

tails as to time and place ; that is, the evidence must simply declare that the witness saw the crime committed at a certain hour, on a certain day, in a specified place. Such testimony only was considered satisfactory. The Hakiroth consisted of seven questions —never more, never less—put to each witness privately, and in the absence of other witnesses.

The appointed members of the Synhedrin, as a necessary preliminary, asked the person about to give evidence whether he actually saw the accused commit the crime with which he was charged. On receiving an answer in the affirmative the Hakiroth were put in the following order :—(1) 'In what Schemitah'—cycle of seven years, reckoning from the last Jubilee—'was the offence perpetrated?' (2) 'In what year of the Schemitah?' (3) 'In what month of the year?' (4) 'On what day of the month?' (5) 'On what day of the week?' (6) 'At what hour of the day?' and (7)

'In what place?' Replies to these seven questions were indispensable and imperative. Failure to answer any one rendered the testimony null and void. The responses thus elicited were regarded as furnishing valid and trustworthy evidence; if untrue it could be falsified by proving an alibi against the witness. Any one of these seven questions unanswered, or unsatisfactorily answered, would preclude the possibility of adopting this course in cases where perjury had been committed.

To procure the condemnation of an accused person, two competent witnesses, independent and not related, were absolutely necessary. Each must have satisfactorily replied to the *Hakiroth*. Agreement of the evidence offered by each was of course a *sine qua non*. To provide, however, for mistakes into which a witness might unintentionally fall, a special series of rules was framed as to questions 6 and 4. These will presently be indicated. From the nature of the

Hakiroth it follows that to convict a criminal it was necessary that two competent persons, to all appearances unprejudiced and impartial, should have detected the offender *in flagrante delicto*.

The second set of questions, the Bedikoth, consisted of inquiries referring to circumstances connected with the commission of the crime. They were not, like the Hakiroth, limited to number. The Synhedrin might ask any number, provided they were relevant; subject, however, to the following conditions: No evidence as to the prisoner's antecedents was admitted; no previous convictions might be urged against him; no proofs of character, good or bad, were allowable. Extenuating circumstances were noted, but only by the judges. The Bedikoth were always strictly confined to details connected with the actual perpetration of the crime. For instance, in a charge of murder the judge would ask whether the witnesses had been acquainted with the per-

son assassinated ; if they had cautioned the prisoner as to the gravity of the offence ; if they had warned him of the punishment to which he was liable upon conviction ; whether they thought the accused was himself cognizant of the serious nature of his crime ; with what weapon the deceased had been slain. In cases of Paganism the inquiries would be what divinities the culprit had worshipped ; what acts constituted the worship ; had he prostrated himself before the images ; had he offered incense to the strange gods ; had he immolated sacrifices in their honour, or poured out libations upon the forbidden altars. In no case was a witness permitted to make a statement for or against the accused. The evidence was strictly confined to replies elicited in response to leading questions from the judges. Hearsay and presumptive evidence was rejected as worthless ; and circumstantial evidence was inadmissible. In the Bedikoth it was of course requisite that the statements of the witnesses

should agree in all essential details; but it was enough if the main facts coincided. If, for instance, a witness in a case of murder testified that the criminal was attired in a black coat, and another asserted he was at the time dressed in a white coat, their evidence was admitted. If, however, one said the murder was committed with a spear and the other with a knife, their evidence was rejected; there was a material contradiction of a material fact. So, too, in a civil cause, if one witness swore that a certain sum of money was contained in a blue bag, and another said it was a red bag, the testimony was good. If, however, one asserted the sum to have been a thousand pieces of silver and the other two thousand pieces, the evidence of both was set aside. Probability was never considered by Hebrew judges. The Jewish lawyers, moreover, held fast by the Mosaic injunction that two or more credible witnesses were required in every case. Where a marked discrepancy was

apparent in the testimony of two persons, one account alone could be deemed trustworthy. There was, as the rabbins reasoned, but one credible witness in such a case; and the Mosaic condition was not fulfilled. The examination of witnesses was conducted in private by judges deputed for that purpose. All testimony not in accordance with the laws of evidence was immediately declared inadmissible; it could not be deposed to in full court. Hence, in all cases where discrepancies were discovered during the preliminary investigation, the statements of the witnesses were not submitted to the judges. There was therefore no possibility of the Synhedrin being prejudiced or influenced by any testimony that failed to satisfy the rules of evidence.

We have said that in the case of the Hakiroth—questions as to time and place—it was indispensable that the statements furnished by two witnesses should coincide. Discrepancies in the respective answers given

in reply to any one question would necessarily invalidate the whole of the evidence brought forward. But such non-agreement in the responses elicited must have been sufficiently marked to constitute a definite discord, an unmistakable contradiction. But, of course, the rabbins were aware that stupidity or unintentional error might account for trifling differences of statement. That any such unimportant variations should not bring about a miscarriage of justice, certain rules were framed applicable to questions 4 and 6, regarding the day of the month and the hour of the day. Among the Hebrews the number of days in a month was not fixed. Sometimes a lunar month consisted of twenty-nine, occasionally of thirty days. When the new moon was announced the public were likewise informed how many days the month would include. If a man happened to be absent when the *hodesh*—new moon—was proclaimed, he might easily go astray in his reckoning. He might have forgotten

whether the preceding month consisted of twenty-nine or of thirty days; as a result he might be in error to the extent of a day. Accordingly the law enacted that, provided the replies of the witnesses coincided in all other respects, a day's difference in the two answers to question 4 should not invalidate the evidence. If, therefore, one asserted that the crime was committed on the first of the month and the other on the second, the testimony held good. But if the former said the second of Nissan and the latter the fourth of Nissan, the evidence was altogether void. A man, urges one of the rabbins, might perhaps make a mistake two months running. To this, however, the majority demur. A conscientious person was not to be lightly suspected of having on two successive occasions neglected the performance of what was regarded as a religious duty. Again, a mistake might easily be made when replying to question 6, that is regarding the

hour of the day. The sun was the town-clock in those times ; an error in respect of an hour, or even two, was by no means impossible. Accordingly, the rules of evidence permitted of a difference or discrepancy of two hours in the respective answers to the Hakiroth. But this was not permissible if the two hours specified were between what to moderns would be eleven in the morning and one o'clock in the afternoon. Here such non-agreement was not allowable. No Eastern was likely to mistake the position of the sun about noon to the extent of two hours.

Such, briefly summarised, are the principal injunctions of the Talmud regulating the admissibility of evidence and the qualifications of witnesses, and specifying the mode of examination. They were calculated to simplify procedure, expedite justice, prevent undue pressure of judicial authority, and, more than all, render impossible those 'hard constructions and strained inferences'

of which Bacon so eloquently bids judges beware.

A sketch of the proceedings in a capital trial will illustrate the practical application of the laws we have already described.